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Supreme Court, U.S.
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No. 95-586

In the Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF WISCONSIN, ET AL., PETITIONERS

v.

GERALD R. MUELLER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Regulations promulgated by the Secretary of Labor, 29 C.F.R. 541.5d and 541.118(a) and (a)(5), specify that employees are not considered to be paid on a "salary basis," and hence are not "professionals" exempt from the overtime compensation requirements of the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, if their pay is subject to deductions of less than a full week's compensation for disciplinary violations (except violations of major safety rules). The question presented is:

Whether the disciplinary deduction rule of the Secretary's salary basis regulation is invalid insofar as it applies to a state employer.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 54 F.3d 438. The opinion of the district court (Pet. App. 11-41) is reported at 858 F. Supp. 885.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1995. A petition for rehearing was denied on July 12, 1995. Pet. App. 9-10. The petition for a writ of certiorari was filed on October 10, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Section 7(a)(1) of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 207(a)(1), requires employers to pay their employees overtime compensation at a "rate not less than one and one-half times the regular rate" for hours worked in excess of 40 per week. Section 13(a)(1) of the Act, 29 U.S.C. 213(a)(1), provides an exemption from this requirement for "any employee employed in a bona fide executive, administrative, or professional capacity * * * (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor])."

Regulations promulgated by the Secretary provide that, in order to be a "bona fide * * * professional," an employee must perform primarily professional duties, 29 C.F.R. 541.3(a)-(d) (emphasis omitted) (defining "professional" employees),[1] and must be paid on a "salary * * * basis," 29 C.F.R. 541.3(e), at a salary of at least the specified level. See also 29 C.F.R. 541.1 (defining "executive" employees), 541.2 (defining "administrative" employees). Employees generally are not considered to be paid on a "salary basis," and thus are not bona fide professionals, if they are paid hourly or piecework wages rather than a salary. See 29 C.F.R. 541.3(e) (bona fide professional employees), 541.2(e)(1) (administrative employees), 541.1(f) (executive employees).[2]

Employees are, however, considered to be paid on a salary basis if they regularly receive a predetermined amount of compensation on a weekly (or less frequent basis) that "is not subject to reduction because of

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[1] The duties component of the regulations is not at issue in this case. See Pet. App. 26.

[2] Professional and administrative employees may be paid on a fee basis. See 29 C.F.R. 541.2(e)(1), 541.3(e).

variations in the quality or quantity of the work performed." 29 C.F.R. 541.118(a). As a general rule, employees are categorized as "salary basis" only if they receive their "full salary for any week in which [they] perform[] any work without regard to the number of days or hours worked." *Ibid.*[3] The regulations allow employers to make deductions from an exempt salaried employee's predetermined compensation to reflect absences of "a day or more" for personal reasons other than sickness or accident, 29 C.F.R. 541.118(a)(2), or to reflect absences for "a day or more" due to sickness or disability if "made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability," 29 C.F.R. 541.118(a)(3). But if an employee's pay may be deducted to reflect absences of less than a full day, that employee is not considered to be paid on a salary basis.

In addition, under 29 C.F.R. 541.118(a)(5) an employer may impose penalties for infractions of safety rules of major significance without affecting an employee's salaried/exempt status. Employees subject to penalties for other infractions resulting in reduction of their weekly salary in any workweek in which any work is performed are not classified as "salaried." See 29 C.F.R. 541.118(a). Thus, employees are not paid on a salary basis if they are subject to unpaid disciplinary suspensions of less than a week's duration as a penalty for infraction of a work rule other than a major safety rule. See *Klein* v. *Rush-Presbyterian-St. Luke's Medical Ctr.*, 990 F.2d 279, 285 (7th Cir. 1993).

b. In 1974, long after the salary basis regulations had first been promulgated, Congress extended coverage of the

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[3] Employees need not be paid for any workweek in which they perform no work. 29 C.F.R. 541.118(a).

FLSA to virtually all public sector employees.[4] In 1976, this Court ruled that the FLSA's minimum wage and overtime provisions could not constitutionally be applied to state employees engaged in traditional governmental activities. *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). Approximately ten years later, *National League of Cities* was overruled. *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-547 (1985). In response to *Garcia*, Congress amended the FLSA to address particular concerns of state and local governments and to allow them relief from liability during a temporary adjustment period. Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, §§ 2-7, 99 Stat. 787. These amendments did not affect the Section 13(a)(1) overtime compensation exemption or the Department's salary basis regulations, and the Department of Labor's implementing regulations expressly made the Part 541 regulations applicable to state and local governments. 29 C.F.R. 553.32(c).

After a period of regulatory review and in light of the FLSA enforcement experience after 1985, the Department of Labor modified the "salary basis" test for public employers. In January 1987, the Department issued an enforcement policy under which the Wage and Hour Administration generally would not deny a Section 13(a)(1) exemption for an otherwise exempt public employee whose pay was reduced for absences of less than a day, if such reductions were required by state or local law.[5] See 57

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[4] In 1966, Congress had earlier extended FLSA coverage to limited categories of state employees: those employed in certain hospitals, institutions, and schools, and in the operation of certain railways or carriers. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 102, 80 Stat. 830.

[5] The enforcement policy was not intended to affect any employee's rights under Section 16(b) of the Act, 29 U.S.C. 216(b)

Fed. Reg. 37,668 (1992) (quoting policy). In September 1991, the Department issued an interim final rule providing that public employees could qualify as exempt under Section 13(a)(1) of the Act even if they are subject to pay deductions for absences for periods of less than a day due to personal reasons, illness, or injury when no leave is available. 56 Fed. Reg. 45,824-45,826 (1991).[6] In August 1992, after notice and comment, the Department issued a final regulation, 29 C.F.R. 541.5d, permitting public employees who otherwise meet the salary basis test to be subject to such deductions for partial-day absences "according to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability."

In issuing this new regulation, the Secretary noted that when the salary basis regulations were first promulgated in the 1940s, evidence showed that professional, executive, and administrative employees in the private sector were nearly always paid on a salary basis. 57 Fed. Reg. 37,666-37,668 (1992). Public employers, however, are normally subject to "principles of public accountability" that prohibit paying employees for time not worked. See *id.* at 37,667. Holding public employers subject to the traditional salary basis rule regarding the deduction of pay for

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(authorizing private suits for enforcement of the Act's wage requirements). *Ibid.*

[6] This interim rule became effective immediately without notice and comment because the Department had become aware that many public employers were, for reasons of public accountability, not permitted to compensate their employees for time during which no work was being performed, and that as a result public employers were exposed to "potentially enormous and generally unexpected back wage liabilities to employees, some of whom would clearly be exempt if duties and amount of compensation alone were examined." 56 Fed. Reg. 45,825 (1991).

partial-day absences, the Secretary recognized, could generally prevent state and local governments from availing themselves of the overtime pay exemption for professional, administrative, and executive employees, *ibid.*, despite Congress's intent, in extending the FLSA to state and local employers, that such employees in the public sector be exempt. *Id.* at 37,672. Thus, because he determined that the partial-day absence regulation enacted before Congress extended the FLSA to state and local government employers was not efficaciously "distinguish[ing] exempt from non-exempt public employees," the Secretary exempted such employees from that rule. *Ibid.*

At the same time, however, the Department retained the disciplinary deduction rule contained in 29 C.F.R. 541.118(a). 57 Fed. Reg. 37,674 (1992). The Department concluded that the comments it had received had not provided "a sufficient basis" for determining "that public employers are significantly more restricted in the availability of options with respect to employee discipline than private employers." *Ibid.* The Department noted that both public and private employers had disciplinary options wholly consistent with the Section 13(a)(1) overtime pay exemption, such as termination, official reprimands, demotions, and reassignment or restriction of duties. *Ibid.*

2. Petitioners are the State of Wisconsin and various Wisconsin state officials and agencies. The private respondents are a class of present and former engineers employed by petitioners whom petitioners classify as exempt from the overtime compensation requirements of the FLSA. Pet. App. 12.

For each biweekly pay period, petitioners paid each individual respondent a predetermined amount that was generally not subject to reductions because of the quantity and the quality of the work performed; in

addition, respondents received straight time (rather than time-and-a-half) overtime pay for work beyond 40 hours per week. Pet. App. 14-15. Respondents have, however, been required to use accrued compensated leave for personal absences of less than a day. *Id.* at 15. In addition, respondents have been subject to unpaid disciplinary suspensions of less than one week for infractions of work rules other than major safety rules, and petitioners have in fact assessed such penalties against employees. *Id.* at 16-17.

3. Respondents filed this suit alleging that petitioners violated the FLSA by failing to pay them required overtime compensation from December 3, 1989, forward. Pet. App. 12. Respondents asserted that they were not bona fide professionals exempted by Section 13(a)(1) of the Act, because petitioners required them to use accrued leave time for personal absences of less than a day, and because petitioners imposed disciplinary sanctions in the form of deductions of less than a week's pay. *Ibid.* Respondents also named the Department of Labor and the Secretary of Labor as defendants, alleging that they had unlawfully promulgated 29 C.F.R. 541.5d, which, as discussed above, provides public employers with an exception to the partial-day deduction portion of the salary basis test. Respondents sought a declaratory judgment that the regulation was invalid. Petitioners contended that the salary basis regulations do not apply to state employees. The federal respondents contended that the regulations as drafted properly apply to petitioners.

4. On cross motions for summary judgment filed by all the parties, the district court directed judgment against the respondents.[7] Pet. App. 41. The court first rejected

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[7] As respondents note (Resp. Br. 1-2), petitioners inaccurately characterize several legal conclusions as "undisputed" "factual

respondents' contention that the Secretary had exceeded his authority in promulgating 29 C.F.R. 541.5d, which modified the salary basis test for public employers. The court noted that where Congress has delegated to an agency the power to define statutory terms, as it did here, the court must accept any reasonable exercise by the agency of its delegated power. Pet. App. 22. The court upheld the Department's rationale for modifying the salary basis regulation, *i.e.*, that if the Section 13(a)(1) regulations were to serve as a shorthand method of identifying administrative, executive, and professional employees in the public sector, they had to accommodate the need of state and local governments to be accountable to the public in their pay practices. Pet. App. 22-26. The court also held that, even as to the period prior to the promulgation of 29 C.F.R. 541.5d for which respondents sought overtime compensation (*i.e.*, 1989-1991), petitioners' practice of requiring deductions from employees' accumulated leave (rather than from compensation) to reflect partial-day absences did not run afoul of the salary basis test. Pet. App. 26-30.[8] See 57 Fed. Reg. 37,676 (Aug. 19, 1992) (stating Department's position that employers

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findings." See Pet. 3-5. These include, for example, issues of congressional intent. Pet. 4 ("The district court *found* Congress could never have intended to apply any part of the salary basis test to public employers.") (emphasis added).

[8] The court concluded in the alternative that even if petitioners' partial-day absence policies ran afoul of the old regulation's salary basis test, Congress could not have intended state and local governments to choose between the obligation to remain accountable to the public and their ability to make use of the FLSA's Section 13(a)(1) exemption. Thus, a regulation denying "exempt" status to state and local governmental employees subject to compensation deductions for partial-day absences would, in the court's view, be invalid. Pet. App. 30.

can require employees to substitute paid leave for absences of less than a day without losing the exemption).

The district court also held that 29 C.F.R. 541.118(a)'s disciplinary deduction rule could not validly be applied to state government employees. Pet. App. 30-39. Pointing to the Department's recognition when it promulgated 29 C.F.R. 541.5d that the partial-day absence rule was unduly restrictive when applied to the public sector, the court believed that the same rationale showed that Congress must not have intended for state and local governments to comply with the disciplinary deduction rule. Pet. App. 33. The court decided that petitioners' disciplinary practices, like partial-day absence policies, were based on principles of public accountability. See *id.* at 35. Skeptical of the availability of other disciplinary options, the court concluded, without reference to supporting evidence, that state and local governments "lack [this] kind of disciplinary flexibility." *Ibid.* Thus, in the court's view, application of the disciplinary deduction rule to state or local governments also conflicted with Congress's intent to afford public sector employers the same opportunities for FLSA exemptions as private employers. The court therefore concluded that 29 C.F.R. 541.118(a)(5) is invalid as applied to the public sector. Pet. App. 34-36.

In support of its decision, the district court invoked the canon that statutes are to be construed, where possible, to avoid serious constitutional questions. The court believed that applying the disciplinary deduction component of the salary basis test to the administrative, professional, and executive employees of state and local governments would raise a serious question under the Guarantee Clause of the Constitution. Art. IV, § 4. The court believed that the Guarantee Clause "supplies the substantive content [that] the Tenth Amendment lacks" by securing to each State " 'the autonomy necessary to maintain a republican form

of government' and by providing an 'essential constitutional limit on federal interference with state autonomy.'" Pet. App. 37 (quoting Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 22-23 (1988)).

The court reasoned that "when congressional action upsets the usual constitutional balance of state and federal powers, 'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' this balance." Pet. App. 38 (quoting *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991)). The court believed that Congress was "thinking primarily in terms of minimum wage requirements and never considered the effect" of salary basis regulations on public pay systems. *Ibid.* Thus, in the court's view, it was inappropriate to interpret the FLSA to require application of the disciplinary deduction component of the salary basis test to public employers. *Ibid.*

The district court also believed that nothing in the salary basis test is essential to an effective extension of the FLSA to government workers.[9] Because the salary basis test is "only a tool for implementing the FLSA, not a part of the substantive law of the FLSA," the court found it all the more unlikely that Congress intended the existing salary basis test to apply to state and local government employers when it extended the FLSA to apply to those entities. Pet. App. 39.

5. The court of appeals reversed and remanded. Pet. App. 1-8. The court noted that petitioners could prevail in

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[9] In support of its assertion, the court noted that the Office of Personnel Management, which administers the FLSA as it applies to most employees of the federal government, categorizes employees as exempt from the Act based on their grade level and position classification. Pet. App. 38-39.

this case "only if the current regulation, which is to say 29 C.F.R. § 541.118 as amended by 29 C.F.R. § 541.5d," validly exempted public employers from the partial-day absence rule but should have extended the exemption to include the disciplinary deduction rule. *Id.* at 5. The court held that the "regulation is valid, period." *Ibid.* Because it was conceded that petitioners "did not comply fully" with the regulation, the court concluded that petitioners are liable to the private respondents. *Ibid.*

In upholding the regulation, the court noted that when Congress explicitly delegates to an agency responsibility for implementing a statutory scheme by defining key terms, as it has done with the Section 13(a)(1) exemption, judicial review is limited to determining whether the agency's action is rationally related to the objectives of the statute containing the delegation. Pet. App. 5. The court ruled that 29 C.F.R. 541.5d "easily passe[s]" that test. *Ibid.* Under principles of "public accountability," the court reasoned, public employees must account for every hour away from work, either by using accrued leave or by sacrificing a pro rata portion of their salary, even though from a functional standpoint they are executive, administrative, or professional employees. Pet. App. 6. In light of this public accountability principle, the effect of the original salary basis regulation was, the court observed, "to bring under the Act [public] workers who in no realistic sense were hourly-wage employees." *Ibid.* Thus, the Secretary's regulation relieving public employees from the general rule against deductions for partial-day absences was rationally related to the objectives of the Act. *Ibid.*[10]

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[10] The court of appeals did not address the district court's ruling that petitioners' policy of docking accrued leave for partial-day absences was permissible under the salary basis test as it stood before

The court of appeals also held that the Department acted reasonably in deciding not to create an exception for public employers from the disciplinary deduction component of the salary basis test. Pet. App. 6-7. While that aspect of the Department's regulation "reduces the employer's disciplinary flexibility," the court of appeals stated, "[n]either the principle of public accountability, nor any other principle of public administration * * * makes it imperative that public employers have th[e] power" to dock executive, administrative, and professional employees less than a full week's pay as a disciplinary measure. *Ibid.*

The court further ruled that because the Secretary's disciplinary deduction rule does not prevent States from bringing functionally executive, administrative, and professional employees within the Section 13(a)(1) exemption, the suggestion that subjecting States to the rule would violate the Guarantee Clause of the Constitution was meritless. Pet. App. 7. Indeed, the court saw no significant relation between the Guarantee Clause and "the employment of engineers." *Ibid.*[11] Thus, the court upheld the Department's decision not to carve out a public employer exception to the disciplinary deduction component of the salary basis test. *Id.* at 8.[12] Because

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29 C.F.R. 541.5d (or the earlier interim final rule) was promulgated. The court of appeals did not need to reach that issue because, as discussed *infra*, it ruled that petitioners' policies ran afoul of the disciplinary deduction component of the test, which was in effect before (as well as after) the changes in the partial-day absence provisions.

[11] Because the Guarantee Clause was inapplicable, the court had no occasion to "speculate on whether the Supreme Court continues to believe that the clause does not create any legally enforceable rights." Pet. App. 7.

[12] The court expressed skepticism about the apparent rationale for the disciplinary deduction rule—namely, that if an employer metes out

petitioners concededly did not comply with the disciplinary deduction regulation, *id.* at 5, 31, the court ruled that the employee respondents were not exempt from the FLSA. *Id.* at 31.[13]

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court. Nor, as petitioners concede (Pet. 10), does it create a direct conflict with any other court of appeals decision. Further review is therefore unwarranted.

1. Petitioners contend that the Department has contravened congressional intent by applying to a state employer the disciplinary deduction component of the salary basis test, 29 C.F.R. 541.118(a) and (a)(5), which implements the FLSA exemption for executive, administrative, and professional employees. See 29 U.S.C.

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discipline in the form of fractions of an employee's weekly salary, the employee is really being paid on an hourly basis. Pet. App. 8. Petitioners, however, were not challenging the rationality of the disciplinary rule "in toto," but rather were challenging the Department's refusal to create a public employer exception to the general rule. *Ibid.* The court rejected that challenge because petitioners had not shown sufficient need for greater disciplinary flexibility than private employers.

[13] The court also dismissed a cross-appeal by the Department of Labor, which had sought review of the district court's ruling that the disciplinary deduction rule was invalid as applied to state and local governments. See Pet. App. 3-4. The court of appeals concluded that the Department could not maintain an appeal because there was no judgment entered against it and the Department was thus not seeking to have a judgment of the district court modified in any way. *Id.* at 3. Although its appeal was dismissed, the Department was an appellee in the court of appeals because it was defending the district court's grant of summary judgment in its favor. As a party to the court of appeals proceeding, the Department is a proper respondent in this Court. See Sup. Ct. R. 12.6.

213(a)(1). The Secretary, however, has been provided broad authority to "define[] and delimit[] from time to time by regulations * * * subject to the provisions of [the Administrative Procedure Act]" who shall be considered an "executive," "administrative," or "professional" employee.[14] *Ibid.* Thus, the Secretary's regulations setting forth such definitions and delimitations must be upheld so long as they are not arbitrary, capricious, or manifestly contrary to the Act.[15] See, *e.g.*, *Sullivan* v. *Zebley*, 493

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[14] Hence petitioners' assertion that the Department has "ma[de] major policy decisions *beyond its authority*" (Pet. 16) (emphasis added) is false; there has been no usurpation here.

[15] Petitioners contend without supporting argument (Pet. 15) that the Department's disciplinary deduction standard is a "non-regulatory interpretation" not entitled to full *Chevron* deference. Perhaps petitioners mean to attach significance to the fact that 29 C.F.R. 541.118 is contained in the "interpretations" subpart of Part 541, rather than the "regulations" subpart. Such an inference would be misguided. First, 29 C.F.R. 541.5d, which indisputably is a "regulation," makes clear that public employers must comply with 29 C.F.R. 541.118. Second, there is every reason to accord full deference to 29 C.F.R. 541.118 standing alone. Although labeled an "interpretation," the provision, like 29 C.F.R. 541.5d, was promulgated pursuant to notice and comment rulemaking in accordance with the congressional authorization of Section 13(a)(1). See 19 Fed. Reg. 1321-1322 (1954); see also *Avery* v. *City of Talladega, Ala.*, 24 F.3d 1337, 1340 (11th Cir. 1994) (holding *Chevron* deference applicable to 29 C.F.R. 541.118); 57 Fed. Reg. 37,666 (1992) (Secretary's salary basis regulations of 1940 and 1954 "were developed from extensive hearings and record evidence"). In any event, petitioners have demonstrated no reason to believe that applying the lesser standard of deference of *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), as they maintain is appropriate (Pet. 15), would lead to a different outcome in this case. See *Klein* v. *Rush-Presbyterian-St. Luke's Medical Ctr.*, 990 F.2d 279, 285 (7th Cir. 1993) (upholding 29 C.F.R. 541.118(a)(5) as applied to private employer under *Skidmore* deference). Cf. *Reich* v. *Newspapers of New England, Inc.*, 44 F.3d 1060, 1070-1072, 1078 (1st Cir. 1995) (upholding interpretations of learned professional and journalism exemptions under *Skidmore*

U.S. 521, 528 (1990); *Batterton* v. *Francis*, 432 U.S. 416, 425-426 (1977).

a. For more than 50 years the Secretary's regulations have provided that an employee must be paid on a salary basis to come within the Section 13(a)(1) exemption. See 5 Fed. Reg. 4077 (1940). And for more than 40 years, the regulations have explicitly stated the disciplinary deduction rule challenged in this case. See 19 Fed. Reg. 4405 (1954). Petitioners below did not contest the reasonableness of the disciplinary deduction rule in general;[16] they challenged it only as applied to state and local government employers. Their certiorari petition in this Court likewise is limited to questioning whether application of the rule to state and local governments is

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standard); *Reich* v. *New York*, 3 F.3d 581, 587 (2d Cir. 1993) (upholding interpretation of administrative exemption under *Skidmore* standard), cert. denied, 114 S. Ct. 1187 (1994).

[16] The courts have upheld the reasonableness of a salary basis requirement for the Section 13(a)(1) exemption. See, *e.g.*, *Walling* v. *Yeakley*, 140 F.2d 830, 832-833 (10th Cir. 1944) ("[I]n most cases, salary is a pertinent criterion and we cannot say that it is irrational or unreasonable to include it in the definition and delimitation [of bona fide executive, administrative, and professional employees]."); see also *Martin* v. *Malcolm Pirnie, Inc.*, 949 F.2d 611, 615 (2d Cir. 1991) (denying executive exemption because employees were not paid on salary basis), cert. denied, 113 S. Ct. 298 (1992); *Tripp* v. *May*, 189 F.2d 198 (7th Cir. 1951) (denying administrative exemption because employee was not paid on salary basis). Although the court of appeals here questioned the rationale underlying the disciplinary deduction component of the salary basis requirement, this rule is a part of a reasonable scheme in which deductions from an employee's weekly paycheck based on the quantity and quality of work are generally deemed inconsistent with exempt status, see pp. 2-6, *supra*, subject to certain exceptions (such as penalties for major safety violations). Indeed, the Seventh Circuit has previously upheld the disciplinary deduction rule in the context of a private employer. *Klein* v. *Rush-Presbyterian-St. Luke's Medical Ctr.*, 990 F.2d 279, 285 (7th Cir. 1993).

consistent with congressional intent. See Pet. App. 8; see also Pet. i (limiting question presented to whether Congress intended disciplinary deduction rule to apply to state employers).

Contrary to the conclusion of the district court, and to the assertions of petitioners (see Pet. 24), the Department's exemption of public employers from another element of the salary basis test—the partial-day absence rule, see 29 C.F.R. 541.5d—does not establish that the Department acted unreasonably in deciding not to differentiate between public and private employers with respect to the disciplinary deduction rule. As the court of appeals held, there is an obvious basis for the Department's decision to omit the partial-day absence rule from the salary basis requirement applicable to public employers, while retaining the disciplinary deduction rule. The Secretary determined that principles of public accountability, which require governments to be accountable to taxpayers for expenditure of public funds, often prohibit public employers from paying employees for time not worked, and that applying the partial-day absence rule to such employers would inappropriately prevent them from availing themselves of the Section 13(a)(1) exemption for executive, administrative, and professional employees.

By contrast, public accountability principles do not require public employers to impose particular forms of discipline, such as unpaid suspensions of less than a week for minor infractions, and such employers have a range of other options for implementing discipline that would allow them to preserve the exception, should they so desire, for particular classes of employees. Pet. App. 7; 57 Fed. Reg. 37,677 (1992); *Jackson* v. *Kentucky*, 892 F. Supp. 923, 933 (E.D. Ky. 1995) ("[N]o compelling public policy reasons make the disciplinary prong of the salary [basis] test more problematic for public employers than for large-scale

private employers."), appeal docketed, Nos. 95-6283 and 95-6284 (6th Cir. Sept. 27, 1995); accord *Meringolo* v. *City of New York*, No. 91 Civ. 7755 (KTD), 1995 WL 702348, at *8 (S.D.N.Y. Nov. 28, 1995); *McCloskey* v. *Triborough Bridge & Tunnel Auth.*, 903 F. Supp. 558, 567 (S.D.N.Y. 1995); *Pautlitz* v. *City of Naperville*, 781 F. Supp. 1368, 1372 n.8 (N.D. Ill. 1992).[17]

b. Reasonableness aside, petitioners argue that Congress intended affirmatively to prohibit the Secretary from implementing the Section 13(a)(1) exemption with the same disciplinary deduction rule for state and public employers that he applies to private employers. Petitioners, however, point to nothing in the text or legislative history of the FLSA's extension to state and local government employers that even remotely suggests such congressional intent.[18] The absence of any such indication is particularly telling because the applicable regulations were promulgated prior to Congress's extension of the FLSA to state and local employees. See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 379 (1982) (Congress presumed aware of published regulations when it extends a statute).

In 1974, Congress specifically addressed the question of exemptions for public employers. In amending the FLSA

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[17] The court of appeals concluded that petitioners had demonstrated no need to impose employee suspensions without pay of less than a week's time. Pet. App. 6-7.

[18] The Department's response to comments received during the 1992 rulemaking does not support petitioners' claim (Pet. 10) that the Department "admitt[ed] * * * that using its salary basis test against public employers had been contrary to the intent of Congress." Rather, the Department's response makes clear that it determined that the partial-day deduction component of the salary basis rule was "unduly restrictive when applied in the public sector," Pet. App. 102, and that exemption from that aspect of the salary basis rule was appropriate.

Congress exempted from overtime requirements certain categories of state and local government employees, such as elected officials, their personal staff, and certain of their appointees and advisers. See 29 U.S.C. 203(e)(2)(C). Moreover, after this Court's decision in *Garcia*, Congress in 1985 considered "the particular needs and circumstances of the States and their political subdivisions" and "respond[ed] to these concerns by adjusting certain FLSA principles with respect to employees of [those entities] and by deferring the effective date of certain provisions of the FLSA insofar as they apply" to them. S. Rep. No. 159, 99th Cong., 1st Sess. 7-8 (1985); see Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, §§ 2-7, 99 Stat. 787. The 1985 amendments did not, however, modify either Section 13(a)(1) or the salary basis test in the Secretary's implementing regulations; thus, nothing in the amendments reflects an intent to restrict the Secretary's authority to define and delimit the scope of the 13(a)(1) exemption.[19] See 29 C.F.R. 553.32(c). In light of the careful consideration Congress gave to the extension of the FLSA to state and local government employees, and to the needs of state and local governments upon the renewal of coverage occasioned by *Garcia*, petitioners' position—that Congress specifically intended to prohibit the Secretary from applying the disciplinary deduction component of the salary basis test to state and local government employers—is without merit.

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[19] The 1985 amendments contain special provisions for governmental employers on subjects such as compensatory time in lieu of overtime, special details, and volunteers. Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, §§ 2-4, 99 Stat. 787-790. The Amendments also added an exemption for employees of the legislative branch of States and their political subdivisions. § 5, 99 Stat. 790.

2. In the absence of any support in the FLSA's text or legislative history, petitioners argue that because application of the disciplinary deduction rule to state and local governments assertedly raises a substantial constitutional question (Pet. 15), and because the rule is not applied to determine whether federal employees fall within the Section 13(a)(1) exemption (Pet. 17), Congress should be presumed to have intended to foreclose the Secretary from applying the disciplinary deduction rule to state and local employers. Neither of those contentions has merit.

a. Invoking the Tenth Amendment (Pet. 26), petitioners contend (Pet. 9) that the court of appeals' ruling "undermines the delicate balance between * * * federal and State sovereignties protected by a web of constitutional provisions." Yet, as petitioners concede (Pet. 25), this Court has rejected the position that application of the FLSA to state and local employers violates the Tenth Amendment. *Garcia* holds that "nothing in the overtime and minimum-wage requirements of the FLSA, as applied to [a state and local transit authority], * * * is destructive of state sovereignty or violative of any constitutional provision"; such a public employer, the Court reasoned, "faces nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, [must] meet." 469 U.S. at 554. Moreover, as petitioners recognize (Pet. 25), "*Garcia* held that detecting the line between mandates to States permissible under the commerce clause and impermissible under the Tenth Amendment should be left to the political process." See 469 U.S. at 551-554.[20]

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[20] *United States* v. *Lopez*, 115 S. Ct. 1624 (1995), does not support petitioners' position, as they seem to suggest. See Pet. 25. *Lopez* held that certain activity did not substantially affect interstate commerce

Petitioners are similarly misguided in contending that the disciplinary deduction rule raises a substantial question under Art. IV, § 4, of the Constitution, which guarantees to each State a republican form of government. Even if the Guarantee Clause creates any legally enforceable rights,[21] its relationship to "the employment of engineers is," as the court below put it, "obscure." Pet. App. 7. Indeed, the law review article on which the district court relied in holding that petitioners' Guarantee Clause claim raised a substantial constitutional question, see Pet. App. 37-38, does not support the proposition that application of the FLSA to respondents raises such a question. While the article does argue that the Clause "bar[s] Congress from regulating the wages of state governors, legislators, judges, and other employees who exercise the powers of republican government"—many of whom are generally exempt from the FLSA, see 29 U.S.C. 203(e)(2)(C)—it recognizes that the Clause has no implications for federal legislation affecting the wages of "[s]chool teachers, hospital orderlies, garbage collectors, bus drivers, and air traffic controllers," who, like respondents here, "do not exercise the lawmaking, adjudicatory, or enforcement functions that characterize a republican government." See D. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 56 (1988).

Even if the Guarantee Clause were read to afford some measure of judicially enforceable protection to petitioners'

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and thus that Congress lacked authority under the Commerce Clause, Art. I, § 8, cl. 3, to regulate it. Petitioners have not contended that their wage practices do not affect interstate commerce for Commerce Clause purposes.

[21] Claims under the Guarantee Clause have been held to be nonjusticiable. *Baker* v. *Carr*, 369 U.S. 186, 224-226 (1962); see also *City of Rome* v. *United States*, 446 U.S. 156, 182 n.17 (1980).

interest in disciplining its engineers, it is difficult to see how the Secretary's disciplinary deduction rule impermissibly impinges on such an interest. See Pet. 13. The disciplinary deduction rule does not prohibit petitioners from imposing suspensions of less than a week for reasons other than violation of major safety regulations; it provides only that employees subject to such suspensions are not deemed to be exempt salaried employees for purposes of the FLSA. Moreover, as the Department has concluded, petitioners may use a host of other disciplinary measures and at the same time retain the Section 13(a)(1) exception. 57 Fed. Reg. 37,677 (1992); see also Pet. App 7 ("[A]ll the states have to do is to delete this form of discipline from their arsenals of disciplinary remedies.").[22]

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[22] The disciplinary deduction rule does not run afoul of any constitutional restriction on federal mandates to the States. In *New York* v. *United States*, 505 U.S. 144, 188 (1992), this Court held that the federal government may not compel the States to enact laws to administer a federal program. The decision specifically distinguished cases "in which Congress has subjected a State to the same legislation applicable to private parties"—including *Garcia*, in which this Court approved the FLSA's coverage of state employers. *Id.* at 160.

Although this Court took Guarantee Clause considerations into account in interpreting the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, in *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), that case is clearly distinguishable. There, the Court was faced with the particularly sensitive question of whether general federal employment legislation overrode a state constitutional provision defining the basic qualifications of state judges. Noting that the qualifications involved a "decision of the most fundamental sort for a sovereign entity," the Court declined to find that the federal statute covered state judges absent a "plain statement" to that effect. *Id.* at 460-461, 467. *Gregory* is inapposite to this case, because discipline of state engineers does not go to such core sovereignty concerns, and because the FLSA, its Section 13(a)(1) exemption, and the relevant regulations (29 C.F.R. 541.5d and 541.118) were intended to cover state employees. Cf. *Reich*

Petitioners' further suggestion (Pet. 19) that adherence to the disciplinary deduction rule would cause them to commit equal protection violations is without merit. Adherence to the FLSA scheme is a rational basis for petitioners' action in imposing different types of discipline on different categories of employees, and thus petitioners would have a defense to an equal protection claim were they to apply different penalty schemes to "exempt" and "non-exempt" employees.[23] See *Jackson* v. *Kentucky*, 892 F. Supp. at 935; see also Pet. 19 (recognizing that petitioners need only supply a rational basis for differential discipline). Moreover, as we have noted, nothing in the statute or regulations *requires* different disciplinary policies; petitioners are free to use or to forgo suspensions of less than one week as to any of their employees. The disciplinary deduction rule merely holds petitioners accountable for payment of overtime compensation to employees who are not salaried.

b. Petitioners also contend that because the exempt status of federal employees is determined without regard to a salary basis test (or disciplinary deduction rule),

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v. *New York*, 3 F.3d at 589-590 (*Gregory*'s plain statement rule does not apply because requirement that State pay overtime compensation to criminal investigator does not strike at heart of representative government and, in any event, FLSA clearly applies to state law enforcement agency), cert. denied, 114 S. Ct. 1187 (1994); *Biggs* v. *Wilson*, 1 F.3d 1537, 1544 (9th Cir. 1993), cert. denied, 114 S. Ct. 902 (1994).

[23] Equally without merit is petitioners' argument (Pet. 19) that should the classes of exempt and non-exempt employees "happen to differ by sex or race," differential treatment of exempt and non-exempt employees would require strict scrutiny. As petitioners apparently recognize (see *ibid.* (quoting *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 279 (1979))), disproportionate impact, as in the speculative scenario posited by petitioners, cannot, absent proof of discriminatory purpose, establish an equal protection violation. *Washington* v. *Davis*, 426 U.S. 229 (1976).

Congress must have intended to prohibit the Secretary from concluding that such a test was appropriate for state and local employers. This argument also lacks merit.

When Congress extended coverage of the FLSA in 1974 to federal employees, administration of the Act with regard to most federal employment was placed in the Civil Service Commission, now the Office of Personnel Management (OPM). 29 U.S.C. 204(f); 5 C.F.R. 551.101(a). Pursuant to that authority, OPM has issued regulations under which agencies are to determine whether employees are exempt. 5 C.F.R. 551.204 (executive), 551.205 (administrative), 551.206 (professional). Although grade classifications play a role in the criteria for exemption, see *e.g.*, 5 C.F.R. 551.203(a) and (b); 551.205(d), the regulations do not include a salary basis test as set forth in the Department's regulations.

Petitioners, however, point to nothing in the FLSA or its legislative history that suggests that Congress intended OPM's actions or regulations governing the federal sector to circumscribe the Secretary of Labor's explicit statutory authority under Section 13(a)(1) with regard to those employers who fall within the Secretary's enforcement authority. Rather, the Secretary is to construe Section 13(a)(1) as he determines is appropriate in light of the conditions he ascertains among the entities that fall within his regulatory jurisdiction.[24] The legislative history of the 1974 Amendments does show that "Congress intended OPM to have a great deal of authority to determine how the FLSA would be administered in the civil service." *American Fed'n of Gov't Employees* v. *OPM*, 821 F.2d 761, 770 (D.C. Cir. 1987) (*AFGE*). However,

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[24] Because OPM has jurisdiction only over federal employees, not state and local ones, it has not expressed a "view * * * that no salary requirement applies to the public sector." Pet. 14.

Congress's decision to vest in OPM authority for carrying out the distinct task of meshing two federal statutory schemes—the civil service laws and the FLSA—to apply them to *federal* employees does not detract from the Secretary's authority to implement a single federal statute, the FLSA, for *nonfederal* employees. See *AFGE*, 821 F.2d at 769.

3. Petitioners contend that there is an "indirect conflict" between the decision below and the Ninth Circuit's decision in *Service Employees International Union, Local 102* v. *County of San Diego*, 60 F.3d 1346 (1995), petition for cert. pending, No. 95-724 (filed Nov. 6, 1995). As their assertion of a mere "indirect" conflict suggests, there is no direct conflict warranting this Court's review.

In *Service Employees Union*, the court of appeals ruled that the Department's entire salary basis test, as it existed before the interim final regulation of September 6, 1991, was invalid as to public employers. The court's focus, however, was not on the disciplinary deduction rule, which is the basis of petitioners' liability in this case, but solely on the tension between the partial-day absence rule and the principle of public accountability. See 60 F.3d at 1352-1353. Because of that tension, the court concluded that application of the salary basis test as it then stood to state and local employers was inconsistent with Congress's intent to make the Section 13(a)(1) exemption available to public employers, because public accountability principles required such employers to deduct pay for time not worked.[25] *Ibid.*

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[25] As the Secretary explained in his amicus brief in support of the petition for rehearing and suggestion of rehearing en banc in *Service Employees Union*, he disagrees with the Ninth Circuit's conclusion that the partial-day absence rule was invalid as applied to public sector

As petitioners concede,[25] the Ninth Circuit did not discuss whether the disciplinary deduction rule was consistent with congressional intent. Moreover, the court of appeals' decision relied on what it viewed as the Secretary's corrective action in promulgating 29 C.F.R. 541.5d, which exempts States from complying with the partial-day absence rule, yet at the same time requires their adherence to the longstanding disciplinary deduction rule as a condition for benefiting from that exemption. 60 F.3d at 1353 ("The 1992 regulation *properly* amends the salary test as applied to the public sector, so that the salary test now takes into account longstanding and reasonable state and local ordinances predicated on public accountability.") (emphasis added). Thus, nothing in the reasoning of the *Service Employees Union* case conflicts with the holding of the court of appeals here that the disciplinary deduction rule as applied to state and local

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employers before the interim final regulation was promulgated in 1991. The Secretary maintains that, even though he modified the regulations in 1991, the pre-1991 scheme, including the partial-day absence rule, was permissible implementation of Section 13(a)(1), which explicitly charges him with defining the qualifications employees must have to be exempt. 29 U.S.C. 213(a)(1) (exemption applies "as [its] terms are defined and delimited *from time to time*" by the Secretary) (emphasis supplied); *Kinney* v. *District of Columbia*, 994 F.2d 6, 10 (D.C. Cir. 1993) (Secretary's statements in preamble to 29 C.F.R. 541.5d do not indicate that Secretary viewed his preexisting regulation as void ab initio, but rather that Secretary was formulating new regulatory principles for public sector employers). In any event, this case raises no issue concerning the validity of the partial-day absence rule prior to 1991, because petitioners' liability is predicated on the disciplinary deduction rule, which is included in both the pre- and post-1991 versions of the salary basis test.

[25] See Pet. 11 n.2 ("Appl[ication of] the disciplinary deduction standard in the public sector was also not involved [in *Service Employees Union*].").

governments is a reasonable exercise of the Secretary's regulatory authority.[27]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[27] Moreover, the statement in *Service Employee Union* that the "entire" salary basis test (as it stood before September 1991) was invalid as applied to public sector employers is clearly misguided. For example, as a part of its reasoning that the regulation was invalid *in toto*, the court of appeals expressed the view that the Department's 1987 "nonenforcement policy covered the entire salary test, not just part of it"; for that reason, the court believed, "essentially *no* valid salary test applicable to the pubic sector existed until the [Department] finally conducted rulemaking in 1991 and 1992." 60 F.3d at 1354. That statement, however, is plainly wrong, inasmuch as the Department's nonenforcement policy related *only* to the partial-day absence rule. See p.4 & n.5, *supra*. Thus the *Service Employees Union* court erred in concluding that the Department's nonenforcement policy supported the conclusion that no aspect of the pre-1991 salary basis test could be applied to public sector employees.